IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 7, 2009 Session

JERRY BURTON YOUNG, SR. v. KAREN GALE ENGEL

Appeal from the Circuit Court for Wilson County
No. 11395 Clara W. Byrd, Judge

No. M2008-02402-COA-R3-CV - Filed March 3, 2010

The father of a ten year old girl petitioned the trial court to increase his visitation time with the child and to offset his child support obligation by a Social Security benefit that the child began to receive when the father retired. The court did not increase the father's visitation, but temporarily reduced it, in order to give the child time to gradually rebuild her relationship with the father and his current wife. The court also declined to offset the father's child support obligation by the child's Social Security benefit, and it transferred from the father to the mother the right to take the federal income tax deduction for the child. We affirm the court's visitation decision and its transfer of the federal income tax deduction from the father to the mother. We reverse its decision on the Social Security income because settled law entitles the father to the offset he requested. We remand for the trial court to make a fresh calculation of the father's child support obligation, considering his less-than-standard visitation.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Reversed in Part

PATRICIA J. COTTRELL, P.J.,M.S., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Anthony Ensley Hagan, Jr., Andrea Hagan, Lebanon, Tennessee, for the appellant, Jerry Burton Young, Sr.

Thomas F. Bloom, Nashville, Tennessee; Susan M. Merry, Lebanon, Tennessee, for the appellee, Karen Gale Engel.

OPINION

I. PRIOR PROCEEDINGS

This is the second time these parties have appeared before this court. The little girl at the center of both appeals was born on February 1998 to Karen Gale Engel ("Mother") and Jerry Burton Young, Sr. ("Father"). When Mother became pregnant with the child, Father, a contractor by profession, bought a five acre lot and installed a large mobile home on it for himself, Mother, and Mother's other three children. Father and Mother considered marriage, but after a disagreement, they decided to separate. Father subsequently married Joyce Young ("Stepmother").

Mother filed a petition seeking to establish parentage, custody and child support. After a hearing on the petition, the trial court named Father as the biological father of the child, awarded custody to Mother, and ordered Father to pay Mother child support of $500 per month, to be increased to $652 per month, after the court-ordered sale of the five acre lot.[1]

The court's order included a very limited schedule for Father's visitation with the child and an award to Father's two adult daughters of regular visitation with her.[2] At Mother's insistence, however, the court ordered that all of Father's future visitation with the child take place in the presence of one of Father's adult daughters or his ex-wife, Sue Young. The court also awarded Father the federal income tax deduction for the minor child.

Mother appealed, seeking reversal of the court's decision to award third party visitation to Father's daughters as well as its award to Father of the federal income tax deduction. This court reversed the trial court's award of third party visitation on constitutional grounds, but found that the trial court did not abuse its discretion in awarding the income tax deduction to Father. *See Engel v. Young,* No. M2001-00734-COA-R3-CV, 2003 WL 1129451 (Tenn. Ct. App. March 14, 2003) (no Tenn. R. App. P. 11 application filed).

---

[1]The court found the property to be partnership property and ordered it sold, with the proceeds to be divided equally between the parties. The increase in child support was presumably ordered to reflect the likelihood that Mother would have to start paying rent elsewhere. However, the court allowed Mother to purchase Father's share from him for $45,000. She continues to live on the property and to receive $652 per month in child support. *See Engel v. Young*, 2003 WL 1129451 at *3.

[2]Mother has three other children from an earlier marriage. Father also has three children from a previous marriage, and Stepmother has two daughters from a previous marriage.

Unfortunately for the child, the parties had problems with their relationships which did not abate with the filing of our opinion. Accusations Mother had made in the proceeding had a chilling effect on Father's efforts to maintain his relationship with the child at the center of this case. An even greater problem was the inability of Mother and Stepmother to get along with each other. At the time of trial in the case herein, there was a separate criminal case pending against Stepmother for making 300 harassing phone calls to Mother over a two-day period. Stepmother denied making such calls, and claimed that Mother herself was guilty of making harassing phone calls. The child was upset because of derogatory remarks that Stepmother made about Mother in her presence on several occasions. The child has expressed a desire to spend more time with Father, but she does not want to be around Stepmother. At the same time, Stepmother resents any contact between Father and Mother, because "I'm his wife. I think that a husband needs to respect their wife."

Time and time again, Father has found himself in the middle of the ongoing feud between Stepmother and Mother, with the result that his visitation with his child has been thwarted, and the relationship with the little girl has been impaired. All three adults in this case have testified that they love the child, but the persistent hostility between the two women has frightened her and has led to her referral to a counselor and months of therapy.

II. CURRENT PROCEEDINGS

On February 3, 2006 Father filed a petition to modify visitation. He noted that the existing parenting plan, which was adopted by the trial court on February 28, 2003, gave him far less than "standard visitation," as that term is understood in the child support guidelines. *See* Tenn. Comp. R & Regs. 1240-2-4-.04(a). He asked that he be granted visitation every other weekend, rather than the one weekend in four ordered under the prior plan, that he be allowed to keep the child overnight on Wednesdays, rather than only from 3:00 p.m to 7:00 p.m. on that day, and that he be given additional visitation during the summer, school breaks, and holidays.

On May 9, 2006, Mother filed an emergency motion to terminate Father's visitation. She claimed that the child was afraid of Stepmother and that she refused to return to Father's house. At the hearing on the motion, a letter from the child's counselor was entered into the record. Among other things, the letter states that the child reported having bad dreams daily or weekly, some involving the stepmother stabbing and trying to kill Mother.

After conducting a hearing on May 19, 2006, the trial court denied Mother's motion. The court did not fully address Father's petition for increased visitation, but it ordered that the child would be allowed to go on vacation to Florida with Father, that Father would be around the child at all times during the summer visitation, that Father and Stepmother were

prohibited from making derogatory remarks about Mother, and that "the Father's wife and the Mother shall pretend that they like each other."

On June 19, 2006, Mother filed a second motion to terminate Father's visitation. She claimed that after going to Florida with Father, the child returned home and told Mother that she no longer wanted any visitation with him.[3] Again, the trial court denied the motion and declared that Father should continue to exercise visitation as previously ordered.

Father reached retirement age, and he began drawing a Social Security check of about $970 a month. As a result, the child also became entitled to a Social Security check, which amounted to $526 per month. The money was sent to Mother for the child's benefit, in addition to the $652 per month she received under the child support guidelines. Mother testified that she put most of the Social Security money in a bank account for the child's college education.

On September 14, 2006, the court conducted a hearing on Father's Petition to increase visitation as well as on several subsequent motions filed by the parties. These included Father's motion to have the child's Social Security benefit credited against his child support obligation and Mother's motion to transfer the child's personal income tax deduction to her.

The trial court approved a new parenting plan that gave Father an additional week of visitation during the summer and during the fall break. However, the new plan left intact the earlier provisions that Father only have weekend visitation every fourth weekend of each month, and that Wednesday visitation extend only from 3:00 p.m. to 7:00 p.m. Further, the order included a special provision that Father's stepchildren be present during his visitation with the child.

The court declined to adjust Father's child support obligation because it preferred to "let the Social Security Administration figure out who the beneficiary of Father's benefits are and what the amount of the benefits will be." The court also declined to transfer the child's personal income tax deduction to Mother.

On August 30, 2007 Father filed a Complaint in which he once again asked the court to review his child support and to credit the child's Social Security benefit against his child support obligation. He also alleged that Mother had refused to let him exercise visitation

[3]Mother asserted that during the hearing on her previous motion to terminate visitation, the judge stated that the child was to be allowed to go on vacation with Father to Florida, and that if after returning from vacation she no longer wanted to exercise visitation with Father, then Mother was to file a motion requesting that his visitation be terminated.

with the child on several occasions, and he again asked the court to allow overnight visitation every Wednesday night so she could attend children's services at church.

In her answer and counterclaim, Mother denied that Father was a fit and proper person to have additional visitation with the child, contended that overnight visitation would be detrimental to the child, and asked the court to further reduce Father's visitation. She also asked that Father's child support obligation be increased in accordance with the child support guidelines.

On March 14, 2008, Mother filed her third motion to terminate visitation. She alleged that on March 7, 2008, there was an incident in which Stepmother and Father argued continuously in front of the child and that at one point, Stepmother "threatened to kill the Father, the minor child and the Respondent/Mother in the presence of the minor child." The trial court conducted a hearing on the motion on April 8, 2008.

The court had received a letter, purportedly written by the child, which included an account of the incident of March 7, 2008. In the letter, the child expressed her fear of Stepmother and her wish that she not be forced to visit with her. During the hearing, the trial court admitted the letter into evidence *sua sponte.* After considering the letter and other evidence, the court found that the child was afraid of Stepmother and ordered Mother to set up counseling for her.[4] The court also ordered that Father's visitation "shall be as the parties may agree," but that Father "shall not take the minor child around Joyce Young." All other issues were reserved for the final hearing. As a result of the court's decision, Father did not exercise any visitation with the child between the April 2008 hearing and the final hearing of August 12, 2008.

III. THE FINAL HEARING

Mother, Father and Stepmother all testified at the final hearing, as did the child's therapist Stacey Lanier and Mother's friend, Alisha Engel.[5] The child testified in the judge's chambers that she wants to spend time with Father, but not in Stepmother's house. She told the judge that "I do miss him, I just don't want to go to his house." She also said she wanted to go to church with Father, but not if Stepmother was there.

---

[4]Father's attorney objected to the admission of the letter on the grounds that it was hearsay and that there was no process of authentication.

[5]Alisha Engel has the same last name as Mother because she is married to Mother's ex-husband.

Ms. Lanier testified that she met with the child weekly or bi-weekly starting in April 2008, and that she had also conducted family sessions with the child, Father, and Mother. Asked whether there was any potential danger for child being around Stepmother, the counselor said she had no opinion because she had never met with Stepmother. After further questioning, she said, "I feel like if Mrs. Young can manage her emotions, then it's not a bad idea for [the child] to be around Joy."

Stepmother acknowledged that she had a problem with anger and testified that she had voluntarily begun going to counseling for the problem after the incident of March 7, 2008. She and Father were both asked about that incident and they testified that it began with ADHD medication for the child that was inadvertently left behind at Mother's house, a phone call to Mother, and a request by Mother that Father come to her house and pick it up. Stepmother was deeply offended about the idea of Father going to Mother's house, and she lost her temper. At trial, Stepmother expressed regret for the some of the things she said. She was asked what she would do if the child were allowed to return to her home and a disagreement arose between her and the child. She responded that she would let Father handle it. Mother's testimony indicated that Father reacted weakly when she asked him about Stepmother: "His response was that his wife gets carried away sometimes. She didn't mean what she said and that sometimes she does go in a rage."

Father testified that after seven or eight counseling sessions, Stepmother had learned how to control her anger. He also testified that he and Stepmother used to fight a lot, but he credited counseling sessions at church with helping them get along better with each other. Father also expressed skepticism as to whether the child had actually written the letter that was sent to the court prior to the hearing of April 8, 2008, because some of the allegations in it were exaggerated and he believed the language and spelling were beyond the child's level.

Father was also questioned closely about his financial affairs. He testified that he has retired and that his income of about $35,000 a year comes from two sources: Social Security and rental from eight houses he owns in his own name. He acknowledged that he also owns two businesses, Jerry Young Construction and Burt's Rentals, both of which were still in operation. He testified that he does not draw any money from either those businesses and that any money they earn is retained by the businesses for growth or for future contingencies. Tax returns for the two businesses showed that Jerry Young Construction had retained earnings of $296,067 and that Burt's Rentals had retained earnings of $451,000.

At the conclusion of proof and after brief closing arguments, the trial court announced its decision from the bench. The court acknowledged the child's desire to be able to spend time with Father, as well as her reluctance to be around Stepmother and her wish not to have

to share her visitation time with her half-siblings and step-siblings. But the court also declared that the child would eventually have to overcome her fear and to accept the participation of all her family members in her life. The court accordingly modified its previous visitation order by creating "a graduated schedule [that] will acclimate the minor child to the previous parenting schedule as set forth in the Order entered on October 26, 2006."

Under the graduated schedule, Father could pick up the child after school every Wednesday, and take her to a restaurant or another public place, with no other family members present. He could also pick her up every Friday, for visitation in a public place that could include other members of the family. On Sundays, she could attend church with Father's entire family, including Stepmother. The court's intention was to "acclimate the minor child to the previous parenting schedule on or before Fall Break."

The court stated that it was unsure how to treat the retained earnings of Father' companies for child support purposes, and it invited the parties to brief the question of applying imputed earnings from those companies to the child support calculation. No such briefing can be found in the record. The court noted that Father was receiving less than standard visitation, but it did not order an upward deviation in his child support obligation to reflect that circumstance. The court also declared that it would not offset Father's child support obligation by the child's Social Security benefit. The court reasoned that no such adjustment was warranted because the money "comes from Social Security. It doesn't cost him any money." The court also transferred the right to take the federal income tax deduction for the child from Father to Mother, and it awarded Mother $2,500 in attorney fees. The court's decision was memorialized in a final order, dated September 22, 2008. This appeal followed.

IV. RESIDENTIAL SCHEDULE

Father argues on appeal that the trial court erred by temporarily restricting his visitation. He contends that the restrictions imposed by the trial court amount to a modification of an existing visitation order and that such a modification can only be ordered if a material change of circumstance can be proved and that such a modification is in the best interest of the child.[6] He further argues that the only evidence that a material change of

---

[6]Tenn. Code Ann. § 36-6-101(a)(2)(C) reads:

> If the issue before the court is a modification of the court's prior decree pertaining to a residential parenting schedule, then the petitioner must prove by a preponderance of the
>
> (continued...)

circumstance had occurred was inadmissible (the child's letter to the court, and certain allegedly hearsay utterances by Mother at the April 8, 2008 hearing). There is no transcript of that hearing in the record, and therefore no basis for us to evaluate Father's contentions as to the admissibility of the evidence presented during that hearing.

We do, however, have the transcript of the final hearing of August 12, 2008, and it includes testimony as to a number of changes in the circumstances of the parties which could warrant a modification of visitation. Thus, even if the trial court erred in admitting the letter purportedly written by the child and the allegedly hearsay testimony by Mother, such error was harmless. The transcript of the final hearing includes the child's oral testimony in chambers that she wanted to spend time with Father but was afraid of Stepmother and didn't want to have any contact with her, the testimony of Susan Lanier, the child's counselor, as to the effect of the conflict between Mother and Stepmother on the child's emotions, and Father's testimony that because of the prior allegations against him and persistent problems with Stepmother, he had not exercised visitation for four months. The court also heard testimony by Stepmother and by Father that Stepmother had undergone anger management counseling, and that her behavior had improved as a result.

Thus, there is ample evidence of a material change of circumstances that made the previous visitation schedule unworkable. The court's discussion of that evidence in its ruling from the bench shows that it was fully aware of the changes that had occurred and of the need to fashion a new visitation schedule to advance the best interest of the child. Father argues that the trial court erred by basing its decision solely on the child's preferences, rather than on her best interest. Contrary to Father's argument, we believe that the court sensitively addressed the child's need for a meaningful relationship with Father and her fear of Stepmother by a plan for a gradual restoration of a visitation schedule that necessarily

---

[6](...continued)
evidence a material change of circumstance affecting the child's best interest. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance for purposes of modification of a residential parenting schedule may include, but is not limited to, significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child.

This court has held that "a material change of circumstances" under Tenn. Code Ann. § 36-6-101(a)(2)(C) which applies to modifications of "a residential parenting schedule," sets out a lower threshold for modification than does a material change of circumstances under Tenn. Code Ann. § 36-6-101(a)(2)(B), which applies to the designation of a different primary residential parent for the child in question. *Massey-Holt v. Holt,* 255 S.W.3d 603, 608 (Tenn. Ct. App. 2007).

involves some contact between the child and Stepmother. Accordingly, we find no error in the trial court's decision on the parenting arrangement.

It also appears that Father's argument has become moot. Prior to the final hearing of the case, Father had not exercised any visitation with the child for four consecutive months. In its ruling from the bench and in its final order of September 22, 2008, the court ordered that Father's visitation be gradually restored by initially allowing Father and daughter to exercise visitation with each other only in public places. The court did not intend for those limitations to be permanent. Rather, it declared that they should be gradually eliminated, and it contemplated that the parenting schedule which was adopted on October 26, 2006 would be fully implemented by the time of the child's Fall break, in October of 2008. We have no reason to believe that the previous schedule has not been implemented in accordance with the trial court's order. Thus, even if we believed (which we do not) that the trial court erred by imposing the limitations it did on Father's visitation, we can offer no meaningful relief at this time.[7]

V. CHILD SUPPORT

Father argues on appeal that the trial court erred in failing to award Father a credit against his child support obligation for the child's Social Security benefits. Mother concedes that Father is correct. This court, as well as the courts of other jurisdictions, have consistently held that a child support obligor should be given credit for Social Security payments to the child based upon the obligor's retirement, because, contrary to the trial court's rationale, the Social Security benefit is not a gift from the government, but was earned by the obligor through his payment of premiums into the Social Security system. *See Martella v. Martella,* No. M2003-03105-COA-R3-CV, 2006 WL 36903 at *4 (Tenn. Ct. App. Jan. 5, 2006) (no Tenn. R. App. P. 11 application filed); *Wilkerson v. Wilkerson*, No. 03A01-9604-CH-00149, 1996 WL 722051 at *2 (Tenn. Ct. App. Dec. 17, 1996); *Sherrell v. Sawyer*, Appeal No. 87-68-II, 1987 WL 12498 at *2 (Tenn. Ct. App. June 19, 1987).

Further, the current child support guidelines (revised August 2008) give the courts clear direction for the proper treatment of such benefits in the calculation of child support. The definitions section of the guidelines states when calculating a parent's "adjusted gross income," one must add "any Social Security benefit paid to the child on the parent's account." Tenn. Comp. R & Regs. 1240-2-4-.02(1)(a). Another section declares that

[7]As we noted in an earlier section, Father's petition called for an increase in his visitation from one weekend in four to one weekend in two and the trial court declined to order such an increase. However, Father does not argue on appeal that the trial court erred in refusing to increase his visitation, but only that it erred in temporarily limiting it.

"Federal benefits, including veteran's benefits and Social Security Title II benefits, received by a child shall be included as income to the parent on whose account the child's benefit is drawn *and applied against the support obligation ordered to be paid by that parent.*" Tenn Comp. R & Regs. 1240-2-4-.04(3)5(I) (emphasis added).

Thus, the guidelines do not permit the court to disregard a child's Social Security check when calculating child support if that check is derived from an obligor parent's account. Instead, the Social Security check must be factored into the child support equation in two places. First, it must be added to the obligor's gross income for the purpose of calculating a presumptively correct amount of child support. Then it must be subtracted from the resulting figure to reduce the proportion of the child's support that comes directly from the obligor's funds.

Father calculates that when the child's $526 monthly check is added to his income, a new presumptive child support obligation is calculated on the basis of the increased income, and the amount of the check is then subtracted from the new presumptive obligation, the resulting obligation becomes $464.28 per month. Mother does not contest the accuracy of this calculation, but she insists that she is entitled to additional child support because of fundamental flaws in the trial court's methodology.

First, she contends that the trial court erred by accepting Father's self-serving account of his own income and by ignoring the retained earnings held by his two solely-owned businesses. Where a business is solely owned, the earnings retained by the business can be considered in determining an obligor's income for the purpose of child support. The reason is that by controlling the distribution of the company's income, the sole owner has the ability to manipulate his reported income for the purpose of reducing his obligations. *Mitts v. Mitts,* 39 S.W.3d 142, 148 (Tenn. Ct. App. 2000) (citing *Sandusky v. Sandusky*, No. 01A01-9808-CH-00416, 1999 WL 734531 at *4 (Tenn. Ct. App. Sept. 22, 1999)).

The trial court recognized that it was within its power to impute to Father some amount of income derived from the retained earnings of his two businesses, and it invited the parties to brief the matter for its decision. *See* Tenn. Comp. R & Regs 1240-2-4-.04(3)(a)(2). Thus, Mother had the opportunity to present argument and authority to the trial court which could have resulted in an increase in Father's child support obligation. However, there is nothing in the record to indicate that Mother took the court up on its offer. Under Tenn. R. App. P. 36, this court is not required to grant relief "to a party responsible for an error or who failed to take whatever action is reasonably available to prevent or to nullify the harmful effect of an error."

Mother insists that the trial court also erred in its child support calculation by basing

the calculation on "standard visitation," when the amount of visitation Father exercises is far less than the standard amount of eighty days a year, as is set out in the child support guidelines. Tenn. Comp. R & Regs. 1240-2-4-.04(7)(a).[8] Under the guidelines, when the alternate residential parent exercises less than standard visitation, the trial court is authorized to order an upward deviation in the amount of child support awarded to the primary residential parent, to compensate for the shift in the financial burden that occurs when one party has increased responsibility for the care of the child.

The current version of the guidelines involves the use of an Income Shares model to determine the appropriate amount of child support. That model employs a child support schedule into which the adjusted gross incomes of both parents are entered, as well as the number of any other minor children they may be obligated to support. A mathematical formula applied to that data results in a Basic Child Support Order (BCSO) which is the presumptively correct amount of child support for the trial court to order the Alternate Residential Parent to pay.

Tennessee Code Annotated § 36-1-101(e) directs the trial court to apply the child support guidelines as a rebuttable presumption in determining the amount of child support for any minor child. The statute and the guidelines themselves both declare that if the court finds the evidence sufficient to rebut that presumption, the court must make written findings that the application of the findings "would be unjust or inappropriate, in that particular case, in order to provide for the best interest of the child . . ." and must state the amount of support that would have been ordered under the guidelines and a justification for a deviation from the guidelines. *See* Tenn. Comp. R. & Regs. 1240-2-4-.07(1)(b).

No such findings are required when the trial court declines to grant a party's request for a deviation from the guidelines. Thus, when a court declines to grant an upward deviation in child support when the record indicates that there are valid grounds for such a deviation, it can be difficult to understand the basis for the trial court's decision. In this case, however, some of the trial court's remarks from the bench indicate that the court believed that because the child was receiving a Social Security check in addition to court-ordered child support, no increase in child support was necessary.

---

[8]That section of the child support guidelines reads, "These Guidelines presume that, in Tennessee, when parents live separately, the children will typically reside primarily with one parent, the PRP, and stay with the other parent, the ARP, a minimum of every other weekend from Friday to Sunday, two (2) weeks in the summer, and two (2) weeks during holidays throughout the year, for a total of eighty (80) days per year. The Guidelines also recognize that some families may have different parenting situations and, thus, allow for an adjustment in the child support obligation."

The guidelines include a set of formulas for calculating adjustments to child support orders when the alternate residential parent is exercising either more parenting time or less parenting time with the child than the standard eighty days a year. *See* Tenn. Comp. R. & Regs. 1240-2-4-.04(7). They further state that "[t]he BCSO (basic child support obligation) *shall* also be adjusted based upon the parenting time of the ARP." Tenn. Comp. R. & Regs. 1240-2-4-.03(6)(d)(2) (emphasis added). In light of the provisions of the child support guidelines as a whole, and of the trial court's reliance on an incorrect ruling about the child's Social Security check as a basis for refusing to increase Father's child support obligation, we hold that the trial court erred by not ordering an upward deviation in Father's child support obligation to compensate for his reduced parenting time. We accordingly remand this case to the trial court with instructions to recalculate Father's child support in accordance with the child support guidelines, including Tenn. Comp. R. & Regs. 1240-2-4-.04(7), and to apply the child's Social Security benefit as described herein.

VI. THE FEDERAL INCOME TAX DEDUCTION

As we stated above, in the first case that brought these parties before the court, the trial court awarded the child's personal income tax deduction to Father, and we affirmed that award on appeal. We noted that under the Federal Tax Reform Act of 1984, the dependency deduction is normally allocated to the custodial parent, but that the Act allows the non-custodial parent to obtain the exemption in certain situations, such as when the custodial parent has released its claim for the exemption. We held that nothing in the federal law prohibits the trial court from ordering the custodial parent to execute a release in appropriate cases, and that such action lies within the sound discretion of the trial court. *Engel v. Young*, 2003 WL 1129451 at *7. *See also Barabas v. Rogers*, 868 S.W.2d 283, 289 (Tenn. Ct. App. 1993); *Chandler v. Chandler*, W2006-00493-COA-R3-CV, 2007 WL 1840818 at *9 (Tenn. Ct. App. June 28, 2007) (no Tenn. R. App. P. 11 application filed).

Father cites the case of *Vittetoe v. Vittetoe*, No.E2005-02149-COA-R3-CV, 2006 WL 2482973 (Tenn. Ct. App. Aug. 29, 2006) (no Tenn. R. App. P. 11 application filed) for the proposition that the trial court erred by transferring the exemption to Mother in the present case. In *Vittetoe,* this court reversed a trial court's reallocation of the dependency deduction from one parent to another because there was nothing in the record to indicate that there was any material and substantial change of circumstances to justify the change. *See Vittetoe v. Vittetoe*, 2006 WL 2482973 at *3

In the current case, there have been significant changes in the situations of the parties since the trial court first awarded the tax exemption to Father. The court initially awarded Father the exemption because his contributions to the child's welfare had been substantial up to that time. He had supported Mother during her pregnancy and after the child was born, and

he furnished housing for both Mother and child. He also provided medical insurance for the child.

By the time the current case came to trial, Father had ceased furnishing any support to Mother, and he had not provided anything for the child beyond the minimum contemplated by the child support guidelines. After his retirement, he also stopped providing medical insurance for the child, and it took a court order to restore his obligation. Further, Father did not exercise any parenting time with the child for four consecutive months, thus increasing Mother's financial burden for the child's daily care. Under the circumstances, we find no error in the trial court's decision to transfer the deduction to the custodial parent.

VII. ATTORNEY FEES

Father contends that the trial court erred in awarding Mother $2,500 for her attorney fees. He concedes that such an award is within the discretion of the trial court, but contends that it would be inequitable for Mother to receive her attorney fees "after she committed perjury and admitted to illegal drug use within the past 3 months."

The attorney was referring to Mother's testimony about the circumstances behind her most recent change of employment. She testified that she left her job at a company named O'Neal Steel because she wanted to pursue a career in a medical field, and that after leaving that company, she took a job as an EMT with an ambulance service.

Under questioning, however, Mother admitted that her boss at O'Neal Steel gave her the choice or either quitting her job or being terminated after she failed three drug screenings. She testified that she had, in fact, been thinking about switching to a medical career for a long time, but admitted that she had told "a little white lie" about the circumstances of her departure from O'Neal Steel. She also admitted that she most recently smoked marijuana, "probably three or four months ago."

We note that Mother was not the only one whose testimony was questionable in this case. Father repeatedly offered non-responsive and confusing answers to questions about his income and about the retained earnings of the companies he owned. Stepmother also avoided giving direct answers to questions about her own behavior, and flatly refused to answer at least one question. Any use of evasion or falsehood on the stand should be discouraged, for such conduct undermines the judicial process. We do not believe, however, that Mother's conduct deprived the trial court of its discretion in the matter of attorney fees.

In cases involving child support, it lies within the discretion of the trial court to award reasonable attorney fees to the party who exercises custody of the child. *See* Tenn. Code Ann. § 36-5-103(c). Such awards are not primarily for the benefit of the custodial parent, but rather to protect the child's legal remedies. *Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992). In exercising its discretion, the trial court may consider whether the requesting party has the ability to pay his or her own attorney's fees. *Shofner v. Shofner*, 181 S.W.3d 703, 719 (Tenn. Ct. App. 2004), but strict proof of inability to pay is not required for such an award. *Gaddy v. Gaddy,* 861 S.W.2d 236, 241 (Tenn. Ct. App. 1993).

At the time of trial, Mother was earning $12.50 per hour working for an ambulance service. She was only working 24 hours a week, but was hoping for an increase to 40 hours a week. There was no proof that she had any substantial amounts of savings at her disposal. In contrast, Father admitted to income from Social Security and from rental property in the amount of $35,000 per year. In addition to his admitted income, he also controls the retained earnings held by his two companies, totaling over $700,000. Given Mother's apparent lack of resources and the equities of the situation, the trial court did not abuse its discretion when it ordered Father to pay Mother's attorney fees in the amount of $2,500.

Mother has also requested that we award her the attorney fees she incurred on appeal. In view of our decision to reverse the trial court on the issue of the Social Security benefits, we decline to grant an award of fees in this case.

VIII.

We affirm the restrictions imposed by the trial court on Father's visitation, the transfer of the child's personal income tax deduction to Mother, and its award of attorney fees to Mother. We reverse the court's decision not to consider either the child's Social Security check or Father's reduced visitation in its child support calculation, and we remand so the trial court can issue a child support order in accord with the governing law. We decline Mother's request for attorney fees on appeal. Tax the costs on appeal to the appellant Father, Jerry Burton Young, Sr.

_____

PATRICIA J. COTTRELL, JUDGE